* IN THE HIGH COURT OF DELHI

\+ ARB. P. No. 201 of 2006

% Date of decision : 29.01.2007

M/S. SATYA PRAKASH & BROS. PVT. LTD. ...PETITIONER
Through: Mr. Aseem Mehrotra, Advocate.

- VERSUS -

AIRPORT AUTHORITY OF INDIA & ORS. ...RESPONDENTS

Through: Mr. Sunil Ahuja, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? No

2. To be referred to Reporter or not? No

3. Whether the judgment should be reported in the Digest? No

SANJAY KISHAN KAUL, J. (ORAL)

(1)The respondent inserted an advertisement inviting tenders for the work of Strengthening of runway 14/32 and taxiway at Trivandrum Airport, Thiruvananthapuram. The petitioner submitted his application in pursuance thereto and was shortlisted in terms of a communication dated 10.02.2003 of the respondent. On opening of the tender received from the petitioner, the petitioner was awarded the contract vide letter dated 24.04.2003.

(2)The petitioner commenced work which was completed where-after the final bill was raised on 18.02.2005. The petitioner accepted the payment with the endorsement “accepted in full and final settlement” on 23.02.2005.

(3)The petitioner, however, raised various claims including on account of amounts withheld for cable damage at site and on account of escalation. The respondent, however, refused to accept the claims. It is an undisputed position that the contract between the parties contains an arbitration clause No.25 but despite demands of the petitioner including vide letter dated 29.12.2005, the respondent refused to appoint an arbitrator on the ground that the petitioner had accepted the full and final payment for all his claims and thus there were no disputes to be referred to arbitration. The respondent's stand was also that in terms of clause 25 of the contract, the claim is to be made within a period of 90 days of the final bill.

(4)The petitioner finally filed the present petition under Section 11 (5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the said Act').

(5)It is relevant to also note that during the pendency of the present petition, the question of settlement of accounts between the parties apparently continued to be a subject matter of discussion which resulted in the payment on 12.07.2006 by the respondent to the petitioner on account of the escalation claim, albeit of a lesser

amount.

(6)Learned counsel for the petitioner contends that the plea of a bar of time beyond 90 days as per clause 25 of the contract would not be sustainable in view of the judgment of this Court in Explore Computers Pvt. Ltd. Vs. Cals Ltd. & Anr. 131 (2006) DLT 477. This Court considered the effect of the earlier judgment of this Court in Union of India Vs. M/s Simplex Concrete Piles Limited 108 (2003) DLT 732 where the same question was raised of filing of a claim within 90 days of the date of final bill. It was held that such a stipulation would be against public policy and would be void under Section 28 of the Contract Act. This was so as such an agreement would seek to restrict a party from enforcing his rights in a Court after the period prescribed under the agreement expires even though the period prescribed by law for enforcement of his rights had not yet expired.

(7)In my considered view, in view of the clear exposition of the legal position in Explore Computers Pvt. Ltd.'s case (supra) and Union of India Vs. M/s Simplex Concrete Piles Limited's case (supra), it is not open to the respondent to plead the bar of time under clause 25 of the contract.

(8)The second aspect to be examined, as urged by the learned counsel for the parties, is the plea of full and final settlement. In this behalf, learned counsel for the respondent has relied upon a judgment of the Apex Court in Wild Life Institute of India, Dehradun Vs. Vijay Kumar Garg (1997) 10 SCC 528. In the facts of that case, the

endorsement made was “No further claim of whatsoever on any ground will be taken up in any court of law or arbitration. Any claim arising on account of Labour Act or otherwise will be our responsibility”. It was in the aforesaid given facts of the case, that it was held that the final payment was accepted by the respondent in full satisfaction of his claims under the contract and there was no dispute outstanding.

(9)Learned counsel for the petitioner, on the other hand, contends that there is no such endorsement in the present case which states that the petitioner will not agitate its right in any Court of law or through arbitration. Learned counsel also seeks to rely upon a judgment of the Apex Court in Bharat Coking Coal Ltd. Vs. Annapurna Construction (2003) 8 SCC 154, where it was held that only because a party accepted the final payment would not imply that it was not entitled to raise any claim. It was observed in para 9 as under:-

> “9. Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim. We, therefore, do not find any merit in the said submission of Mr.Sinha.”

(10)The present case in its given facts is one which falls within the nature of endorsement made in Bharat Coking Coal Ltd.'s case (supra) and thus, the petitioner cannot be prohibited from raising any claim. Another aspect which is important in the present case is

that if there had been such a full and final settlement on 23.02.2005, there would have been no occasion for the respondent to entertain any claim of the petitioner thereafter. The petitioner has been paid a large amount on 12.07.2006 on account of the claim of escalation. This itself is another factor to show that there was no full and final settlement prohibiting the rights of the petitioner to urge its claim before the Court or in arbitration proceedings in accordance with law.

(11)The respondent has failed to appoint an arbitrator in terms of the arbitration clause despite notice within the stipulated time. It is, thus, this Court which would have to exercise its powers to appoint an arbitrator. I hereby appoint Mr. S.K. Mahajan, Retired Judge of this Court as a sole arbitrator to enter upon the reference and adjudicate the disputes between the parties. The sitting fee of the arbitrator will be fixed by the arbitrator himself subject to a total fee limit of Rs. 3 lacs apart from out of pocket expenses. The fee of arbitration shall be borne initially by the petitioner to form part of the main cause.

(12)The petition is allowed leaving the parties to bear their own costs.

(13)A copy of this order be sent expeditiously to the arbitrator.

January 29, 2007 SANJAY KISHAN KAUL, J.
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